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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area	)))))))	WC Docket No. 09-135

INITIAL COMMENTS OF BROADVIEW NETWORKS, INC.,
NUVOX, AND XO COMMUNICATIONS, LLC

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Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on August 20, 2009,[1] Broadview Networks, Inc., NuVox, and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), by their attorneys, hereby file their comments in response to the petition filed by Qwest Corporation ("Qwest") on March 24, 2009, pursuant to Section 10 of the Communications Act of 1934, as amended,[2] requesting that the Commission forbear from applying to Qwest Section 251(c)(3) unbundled network element ("UNE") requirements and certain other rules and regulations in the Phoenix, Arizona Metropolitan Statistical Area ("MSA").[3] For the reasons set

1 *Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, Public Notice, DA 09-1836 (rel. Aug. 20, 2009).

2 *See* 47 U.S.C. § 160.

3 Qwest seeks forbearance from the loop and transport unbundling regulations contained in Sections 251(c)(3) and 271(c)(2)(B)(ii) of the Act. 47 U.S.C. § 251(c)(3), 271(c)(2)(B)(ii). Qwest also seeks forbearance from the dominant carrier tariff

forth herein, Qwest's request for forbearance from UNE unbundling obligations in the Phoenix MSA should be denied in its entirety.[4]

I. INTRODUCTION AND SUMMARY

It is difficult to identify any aspect of the review the Commission must undertake in the instant forbearance docket that will not be duplicative of the review it is currently undertaking (and is required by the D.C. Circuit to conduct) in the Verizon/Qwest remand proceedings. The Commenters today, under separate cover, are submitting a proposed roadmap for addressing UNE forbearance petitions to the Commission in the remand dockets. The Commenters will urge the Commission to retire the Section 251(c)(3) forbearance standard used in previous forbearance proceedings and replace it with a market power-based analysis. A market power analysis, which has been employed by the Commission in a variety of proceedings over the past twenty years, requires a robust assessment of the competitive environment in the product and geographic markets at issue and therefore should lead to forbearance awards only in situations where the elimination of UNE obligations would not negatively affect the nature and extent of competition or the availability or price of services offered to end user customers.

The Commenters maintain that the appropriate course of action in this docket is to dismiss consideration of the instant Phoenix forbearance petition until the Commission has

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requirements set forth in Part 61 of the Commission's rules; from price cap regulations set forth in Part 61 of the Commission's rules; from the *Computer III* requirements, including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements; and from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules concerning the process for acquiring lines, discontinuing services, or making assignments or transfers of control. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 09-135 (filed Mar. 24, 2009) ("*Second Phoenix Petition*"), at 7-11.

4 As discussed herein, the Commenters oppose Qwest's request for forbearance from UNE unbundling obligations but take no position on Qwest's requests for forbearance from the other rules and regulations specified in its petition.

completed its work in the Verizon/Qwest remand dockets. Once that work has ended and the Commission has settled on an appropriate framework for review of UNE forbearance requests, it can be applied here to the facts proffered by Qwest to support forbearance. It is difficult to identify how any credible analysis of the instant petition can be conducted until that time.

Should the Commission decide to proceed with this proceeding, however, the revised standard proposed by the Commenters in the Verizon/Qwest remand docket should be applied to Qwest's second petition for UNE forbearance in the Phoenix MSA. As explained below, application of that standard to the record before the Commission compels rejection of Qwest's petition.

Under the standard proposed by the Commenters, the Commission must determine, separately for each product market, whether Qwest continues to possess market power. Market power is assessed based on the state of competition in the product and geographic markets at issue. As shown herein, Qwest has utterly failed to prove that there is sufficient facilities-based competition in the business market in the Phoenix MSA.

Qwest takes little care in distinguishing retail competition in general from facilities-based competition, either retail or wholesale. Yet the presence of facilities-based competition is the touchstone of the requisite forbearance analysis. To the extent there is some actual competition in Phoenix today (and the Commenters do not contend there is none), Qwest is largely silent regarding the extent to which the competitive entities that provide service are using their own facilities in contrast with depending heavily upon the very UNEs for which Qwest is seeking forbearance.

Specifically, Qwest relies heavily on the presence of cable competition in the Phoenix MSA. While offering generalities regarding the scope of competition in the business market from Cox, however, Qwest largely fails to provide the Phoenix-specific, granular data necessary to measure and evaluate the presence of facilities-based competition in that market from this cable company. Instead, Qwest relies upon insufficient and overly-broad representations (and estimates) of competition by Cox *nationally*. This type of presentation makes it largely impossible to discern the extent of actual facilities-based competition from cable in the Phoenix MSA. Moreover, Qwest ignores other problems inherent to cable-based provision of services to the business market in Phoenix due to a lack of physical proximity, technical inability, or both.

Qwest also attempts to justify UNE forbearance in the business market within Phoenix on the purported existence of at least 30 unaffiliated CLECs actively competing with Qwest for business customers in the Phoenix MSA. Qwest provides some data regarding the scale of access lines served by its competitors. Significantly, however, Qwest fails to provide any data regarding the extent of competition in the business market from CLEC-owned last-mile facilities. Indeed, Qwest acknowledges that its data excludes access lines served via (1) entirely CLEC-owned network facilities, (2) network facilities leased from non-Qwest providers, and (3) the purchase of Special Access service from Qwest. However, competition offered via CLEC-owned network facilities and network facilities leased from non-Qwest providers serving the last mile are the very data needed by the Commission to evaluate Qwest's petition for forbearance from unbundling obligations. Consequently, Qwest's petition fails to demonstrate that CLECs do not remain heavily dependent on unbundled network elements, especially unbundled loops and EELs. This is definitely the case for XO, one of the Commenters, as detailed further herein.

Finally, Qwest attempts to justify its forbearance requests for the business market on the basis of purported wholesale alternatives to the use of its Section 251(c)(3) network elements. To this end, Qwest relies on the wholesale offerings of several carriers, claiming that the overall fiber coverage of the Phoenix MSA by these wholesale providers is extensive. Yet Qwest overlooks that fact that, today, these providers access with their own facilities substantially fewer than 1000 commercial buildings, without even accounting for double counting, as explained herein. Moreover, when a competitor lights a building, this does not mean that the property owner or manager has given the carrier access to serve the entire building. Rather, access may be limited to certain tenants or certain floors, whereas Qwest alone is much more likely to have access to the entire building.

Further, as explained below, adding buildings to a network is not as straightforward as Qwest maintains. There are considerable costs associated with adding "near net" buildings, and there must first be a business case for doing so. XO will consider adding a building only when customer demand equals or exceeds 3 DS-3s of capacity, due to the costs associated with construction, rights of way access, building access, and other matters. While Qwest attempts to paint a rosy picture of the impact alternative facilities providers are having on enterprise competition within the Phoenix MSA, a closer look at these providers reveal their limited suitability as a source of leased facilities for competitive carriers.

Thus, Qwest has failed to sustain its burden to prove that forbearance from UNE unbundling obligations in the business market in the Phoenix MSA is warranted and its request should be denied.

II. BACKGROUND

A. Qwest's Request For Forbearance In The Phoenix MSA Has A Complicated History

The above-captioned petition seeks the same regulatory relief in the same geographic market as the Phoenix forbearance petition recently remanded to the Commission by the U.S. Court of Appeals for the D.C. Circuit.[5] In April 2007, Qwest filed separate petitions seeking forbearance from loop and transport unbundling obligations pursuant to Section 251(c)(3) in the Phoenix MSA and three other geographic markets.[6] Qwest argued that it faced competition in the Phoenix MSA "from a wide range of technologies and a broad array of service providers" and that forbearance was warranted on the basis of the "multiple competitive alternatives [ ] available to mass market and enterprise customers alike."[7] According to Qwest, cable provider Cox, each of the nation's major wireless carriers, several dozen over-the-top VoIP providers, and numerous traditional competitive local exchange carriers ("CLECs") were all competing with Qwest for mass market and enterprise customers.[8] Competition in the Phoenix MSA, in Qwest's view, was "far more advanced" than it had been in the Omaha MSA when, in 2005, the Commission granted limited forbearance from Section 251(c)(3) unbundling obligations.[9]

Upon completion of an extensive proceeding, in July 2008, the Commission issued an order denying Qwest the requested relief in all four markets.[10] Notwithstanding Qwest's representations, the Commission found that the record evidence did not satisfy the

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5 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007) ("*First Phoenix Petition*").

6 Qwest also sought forbearance for mass market and enterprise services from Part 61 dominant carrier tariffing requirements, Part 61 price cap regulations, and dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules concerning acquiring lines, discontinuing services, and assignments or transfers of control.

7 *First Phoenix Petition*, at 1.

8 *Id.*, at 1-2.

9 *Id.*, at 2.

10 *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729 (2008) ("*Qwest 4-MSA Order*").

Section 10 forbearance criteria with respect to any of the forbearance Qwest sought. In reaching its decision, the Commission followed the approach it adopted in the *Omaha Forbearance Order*[11] and subsequent decisions for determining when forbearance from unbundling obligations is justified.[12] The Commission found that record evidence demonstrated that Qwest is not subject to a sufficient level of facilities-based competition to grant relief under the Commission's precedent.[13] More specifically, the Commission held:

> Lacking significant evidence of the type of last-mile facilities-based competition the Commission relied on in the *Qwest Omaha* and *ACS UNE* forbearance proceedings to grant relief, we find that the criteria of section 10(a) are not satisfied with respect to Qwest's request for forbearance from UNE obligations in these MSAs.[14]

The Commission's action was consistent with its determination seven months earlier in the *Verizon 6-MSA Order*. In December 2007, the Commission issued an order denying Verizon forbearance from loop and transport unbundling obligations in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.[15] There, as in the *Qwest 4-MSA Order*, the Commission found insufficient actual last-mile facilities-based competition to satisfy the Section 10 criteria.[16]

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11 *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*") *aff'd Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

12 *Qwest 4-MSA Order*, at ¶ 35.

13 *Id.*

14 *Id.*, at ¶ 36.

15 *Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*Verizon 6-MSA Order*").

16 *Verizon 6-MSA Order*, at ¶ 27.

Both Verizon and Qwest appealed the Commission's decisions denying their requests for forbearance from Section 251(c)(3) unbundling obligations to the D.C. Circuit. Verizon's appeal was filed in January 2008 and Qwest's appeal followed six months later.[17] Verizon argued that the Commission erroneously denied its forbearance petitions by unlawfully departing from the legal standards and analyses in its prior forbearance orders. Specifically, Verizon contended that the FCC's order should be vacated because it relied on a new bright-line market share test to determine whether the retail market in the six MSAs at issue was sufficiently competitive to warrant forbearance from unbundling requirements.[18]

The central dispute in Qwest's appeal was the same market share issue that had been raised by Verizon. Consequently, Qwest, in a consent motion, asked the Court to defer briefing in its case until after the Court issued a decision in the Verizon case.[19] In February 2009, the D.C. Circuit ordered Qwest's appeal to be held in abeyance and directed the parties to file motions to govern further proceedings in the case 30 days after its disposition of the Verizon case.[20]

On June 19, 2009, the D.C. Circuit granted Verizon's petition for review on the limited ground that, in light of agency precedent, the Commission had not adequately explained its decision to deny Verizon's petition on the basis of Verizon's retention of a specified percentage share of the retail market.[21] The Court remanded – but did not vacate – the *Verizon*

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17 *Verizon Telephone Companies v. FCC*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008); *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. filed Jul. 29, 2008).

18 *See* Brief for Petitioners the Verizon Telephone Companies, *Verizon v. FCC*, No. 08-1012 (D.C. Cir.), filed Sept. 16, 2008, at 34.

19 *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Qwest's Consent Motion for Extension of Time (filed Jan. 9, 2009).

20 *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Feb. 11, 2009).

21 *Verizon v. FCC*, No. 08-1012 (D.C. Cir. Jun. 19, 2009), Slip Op. at 12-18.

6-MSA Order to the Commission for further explanation.[22] In light of the Court's decision, in July 2009, the Commission filed a motion to the D.C. Circuit for voluntary remand of the Qwest case.[23] The Commission stated that a remand would "give the Commission the opportunity to reconsider its analysis and decision ..., enabling it to issue a ruling on the Qwest petitions in light of the Court's guidance provided by the Verizon decision."[24] Qwest consented to the Commission's motion.[25] And, on August 5, 2009, the Court granted the motion and remanded the case to the Commission.[26]

Thus, Qwest's original petition for forbearance from unbundling obligations in the Phoenix MSA is once again before the Commission for review, analysis and decision. Qwest, in other words, already has won its coveted second look at competition in the Phoenix market.[27] With the filing of the instant petition, there now are two petitions seeking identical regulatory relief in the Phoenix MSA pending before the agency.[28]

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22 *Id.*, at 3, 18-19.

23 *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Motion of the Federal Communications Commission for a Voluntary Remand (filed Jul. 17, 2009) ("*FCC Motion*").

24 *FCC Motion*, at 5.

25 *Id.*, at 1.

26 *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir.), Order (Aug. 5, 2009).

27 On August 20, 2009, the Commission issued a Public Notice commencing the remand docket. Comments in response to the Public Notice are due today. *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, DA 09-1835 (rel. Aug. 20, 2009) ("*August 20th Public Notice*").

28 On August 25, 2009, the Commenters filed a motion for summary denial of Qwest's second Phoenix petition on the ground that the petition is unnecessary and would result in the needless expenditure of agency and industry resources. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area*, WC Docket No. 09-135, Motion for Summary Denial (filed Aug. 25, 2009). The motion is pending.

B. The Standard That Will Apply To Qwest's Request For Forbearance In The Phoenix MSA Is Being Addressed In The Verizon/Qwest Remand Dockets

It is difficult to identify any aspect of the review the Commission must undertake in the instant forbearance docket that will not be duplicative of the review it is currently undertaking (and is required by the D.C. Circuit to conduct) in the Verizon/Qwest remand proceedings. In the remand proceedings, the Commission will decide whether to retain the framework for its marketplace analysis established in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*[29] or whether to depart from that precedent.[30] It will determine the appropriate product and geographic markets for its Section 251(c)(3) forbearance analysis and it will decide what evidence beyond the petitioning carrier's market share for a particular product market is relevant to whether forbearance is warranted.[31] In short, in the remand dockets, the Commission will develop a comprehensive approach to UNE forbearance petitions and it will apply that approach to the Qwest petitions seeking forbearance in the Phoenix, Denver, Minneapolis-St. Paul, and Seattle MSAs as well as the Verizon petitions seeking forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.

The Commenters today, under separate cover, are submitting a proposed roadmap for addressing UNE forbearance petitions to the Commission in the remand dockets.[32] The Commenters will urge the Commission to retire the Section 251(c)(3) forbearance standard used

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29 *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*").

30 *August 20th Public Notice*, at 3-4.

31 *Id.*

32 *See* Comments of Broadview Networks, Inc., Covad Communications Company, NuVox, and XO Communications, LLC, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Commenters' Remand Proceeding Comments*").

in previous forbearance proceedings and replace it with a market power-based analysis. A market power analysis, which has been employed by the Commission in a variety of proceedings over the past twenty years, requires a robust assessment of the competitive environment in the product and geographic markets at issue and therefore should lead to forbearance awards only in situations where the elimination of UNE obligations would not negatively affect the nature and extent of competition or the availability or price of services offered to end user customers. In short, a market power analysis would avoid the pitfalls of the *Omaha/Anchorage* UNE forbearance standard and would allow for a comprehensive assessment of whether forbearance is warranted.

The Commenters maintain that the appropriate course of action in this docket is to dismiss consideration of the instant Phoenix forbearance petition until the Commission has completed its work in the Verizon/Qwest remand dockets.[33] Once that work has ended and the Commission has settled on an appropriate framework for review of UNE forbearance requests, it can be applied here to the facts proffered by Qwest to support forbearance. It is difficult to identify how any credible analysis of the instant petition can be conducted until that time. Certainly, the Commission cannot render a decision on the merits of Qwest's petition until after it has settled on the standard to judge it by. Moreover, it is possible that once the Commission resolves the remand dockets there will be nothing remaining for it to decide in this proceeding. Should the Commission decide to consider new factual evidence in the remand dockets – which it should not do – this proceeding may well become duplicative of the Qwest remand proceeding

[33] As indicated in footnote 28, *supra,* the Commenters believe that the best course of action is for the Commission to summarily deny the instant Phoenix forbearance petition and they have filed a motion seeking that result. Should the Commission refrain from granting the motion, however, it should suspend the instant proceeding until its work in the Verizon/Qwest remand dockets has been completed.

and, thus, wholly unnecessary. Consequently, allowing the instant docket to proceed in parallel with the remand proceedings could result in the needless expenditure of Commission and industry resources.

Should the Commission decide to proceed with this proceeding, however, the revised standard proposed by the Commenters in the Verizon/Qwest remand docket should be applied to Qwest's second petition for UNE forbearance in the Phoenix MSA. As explained below, application of that standard to the record before the Commission compels rejection of Qwest's petition.

III. A MARKET POWER ANALYSIS SHOULD BE EMPLOYED BY THE COMMISSION TO ADDRESS QWEST'S UNE FORBEARANCE REQUEST

The Commenters suggest that the Commission adopt a market power approach to UNE forbearance requests. This approach incorporates appropriate elements from the standard developed in the *Omaha Forbearance Order* while avoiding several material shortcomings of that standard. A market power analysis has the additional benefit of having been perfected through development and application in a number of varied proceedings over the past twenty years, including proceedings in which ILECs have sought forbearance from dominant carrier rules and regulations.

A. The History Of The Dominance/Market Power Analysis

Between 1979 and 1985, the Commission conducted the *Competitive Carrier* proceeding, in which it examined whether and how its regulations should be adapted to promote competition in telecommunications markets.[34] In a series of orders in that proceeding, the

34 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further

Commission identified two types of carriers – those with market power (dominant carriers) and those without market power (non-dominant carriers).[35] The Commission relaxed its regulation of non-dominant carriers based on its conclusion that non-dominant carriers could not charge rates or engage in practices that violate the requirements of the Communications Act of 1934, as amended ("Act") since customers always had the option of taking service from a dominant carrier whose rates and terms remained subject to regulation. In determining whether an entity possessed market power (and was therefore dominant), the Commission focused on certain identifiable market features, including "the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services," and whether the firm controlled "bottleneck facilities."[36]

In its *Fourth Report and Order*, the Commission, more specifically defined market power alternatively as "the ability to raise prices by restricting output" and as "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."[37] In addition, the Commission recognized that, in order to

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Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied MCI v. AT&T*, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984), Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the "*Competitive Carrier*" proceeding).

35 *First Report and Order*, 85 FCC 2d at 20-21. The Commission's current rules define a dominant carrier as one that possesses market power, and a non-dominant carrier as a carrier not found to be dominant (*i.e.,* one that does not possess market power). 47 C.F.R. §§ 61.3(q), 61.3(y).

36 *Id.*

37 *Id.*, at 558 (citing A. Areeda & D. Turner, Antitrust Law 322 (1978) and W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981)).

assess whether a carrier possesses market power, the relevant product and geographic markets first must be defined.[38]

In its 1995 *AT&T Reclassification Order*, the Commission determined whether AT&T continued to possess market power in the interstate, domestic, interexchange market.[39] The Commission applied "well-accepted principles of antitrust analysis" to focus on: (1) AT&T's market share; (2) the supply elasticity of the market; (3) the demand elasticity of AT&T's customers; and (4) AT&T's cost structure, size, and resources.[40] This analytical approach has been followed by the Commission in a number of subsequent proceedings in which the question of whether a particular entity or entities should continue to be subject to dominant carrier regulation was at issue.[41]

B. Application Of The Market Power Analysis To Address Forbearance From Dominant Carrier Regulations

The Commission also has applied the market power principles outlined above in assessing petitions seeking forbearance from dominant carrier rules and regulations under Section 10 of the Act.[42] In 1998, US West Communications, Inc. ("US West") petitioned the

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38 *Id.*, at 562.

39 *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 (1995) ("*AT&T Reclassification Order*").

40 *Id.*

41 *See, e.g., Motion of AT&T Corp. to be Declared Non-Dominant for International Services*, 11 FCC Rcd 17997 (1996) ("*AT&T International Non-Dominance Order*"); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*"); *COMSAT Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14118 (1998) ("*COMSAT Reclassification Order*").

42 As the Commission has noted, a request for forbearance from specific dominant carrier rules is substantively different from a request for reclassification as a non-dominant carrier. *See, e.g., Omaha Forbearance Order*, at ¶ 17.

Commission for forbearance from dominant carrier rules governing its provision of certain special access and high capacity dedicated transport services in the Phoenix, Arizona MSA.[43] After US West filed its petition, US West, the SBC Companies ("SBC"), the Bell Atlantic Telephone Companies ("Bell Atlantic") and the Ameritech Operating Companies ("Ameritech") filed several additional forbearance petitions seeking pricing flexibility in the provision of certain special access and high capacity dedicated transport services in many markets throughout the United States for substantially the same reasons proffered by US West in its Phoenix petition.[44] The Commission addressed the petitions on a consolidated basis. In doing so, it considered the petitioning Bell Operating Companies' ("BOCs'") assertions and evidence "that they no longer possess market power in the provision of special access and high capacity dedicated transport services in the specified market(s) because there is sufficient competition to prevent them from raising prices above competitive levels."[45]

The Commission denied each of the requests for forbearance, concluding that the record in the proceedings concerning the state of competition in the market for special access and high capacity dedicated transport services was not sufficiently developed to support a conclusion

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43 *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 (filed Aug. 24, 1998).

44 *Petition of the SBC Companies for Forbearance from Regulation as a Dominant Carrier for High Speed Dedicated Transport Services in Specified MSAs*, CC Docket No. 98-227 (filed Dec. 7, 1998); *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Seattle, Washington MSA*, CC Docket No. 99-1 (filed Dec. 30, 1999); *Petition of the Bell Atlantic Companies for Forbearance from Regulation as Dominant Carrier, in Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Washington, D.C., Vermont and Virginia,* CC Docket No. 99-24 (filed Jan. 20, 1999); *Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA*, CC Docket No. 99-65 (filed Feb. 5, 1999).

45 *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd 19947, 19959 (1999) ("*US West Forbearance Order*").

that the BOC petitioners lack market power, and thus qualify for forbearance.[46] US West appealed the Commission's decision to the D.C. Circuit, charging that the Commission erred in focusing exclusively on market share and in not considering evidence of supply and demand elasticity in its forbearance analysis.[47] In response, the Commission argued that market share data is critical to a *prima facie* showing of competition.[48] The D.C. Circuit remanded the case to the Commission, holding that the Commission's conclusion that market share data is essential for a *prima facie* showing of competition "simply is not consistent with the agency's earlier decisions" which also considered "supply substitutability, elasticity of demand, and the cost structure, size and resources of the carrier" in assessing market power.[49] Importantly, the Court did not suggest that it would be unlawful for the Commission to apply a forbearance standard that focused initially (or principally) on market share. Should the Commission decide to do so, however, it must explain its decision. The Court held:

> The FCC's new policy that market share data is essential to evaluate a carrier's market power may well be reasonable, but until the Commission has adequately explained the basis for this conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act.[50]

More recently, the Commission has applied traditional market power principles to assess whether separate petitions by Qwest, ACS of Anchorage, Inc., and Verizon for forbearance from various dominant carrier tariffing requirements, price cap regulations, and Section 214 rules for acquiring and discontinuing lines and for assignment or transfers of control

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46 *US West Forbearance Order*, at 19953.

47 *AT&T Corp. v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001).

48 *Id.*

49 *Id.*, at 736.

50 *Id.*, at 737.

should be granted in certain geographic markets.[51] The Commission has carefully noted that because it is conducting a *forbearance* analysis and not a *dominance* analysis, "the four-factor [market power test] does not bind" its determinations.[52] At the same time, in each case it has applied established market power criteria to assess whether forbearance should be granted.

C. The Elements Of A Market Power Standard

The components of a market power analysis are well-established and straightforward. Under this framework, the Commission: (1) delineates the relevant product and geographic market(s) for examination; (2) identifies the firms that are current or potential suppliers in that market; and (3) determines whether the carrier under evaluation possesses individual market power in that market.[53]

The first tasks in the Commission's market power analysis are to establish the relevant product and geographic markets and to identify all relevant suppliers in each market. Once these tasks are completed, the Commission's attention must turn to whether a petitioning party possesses market power. This determination is made based on a comprehensive assessment of the state of competition in the individual product and geographic markets at issue.[54] Under well-established principles of antitrust analysis, the Commission must review: (1)

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51 *See Omaha Forbearance Order*, at ¶ 17; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, For Forbearance From Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, ¶ 26 (2007) ("*ACS Dominance Order*"); *Verizon 6-MSA Order*, at ¶¶ 20, 27; *Qwest 4-MSA Order*, at ¶ 13.

52 *Omaha Forbearance Order*, at n.52.

53 *Id.*, at ¶18 (citing *LEC Classification Order*, at 15776, 15782).

54 *See, e.g., Omaha Forbearance Order*, at ¶ 25.

the petitioner's market share; (2) the demand elasticity of the petitioner's customers; (3) the supply elasticity of the market; and (4) the petitioner's cost structure, size, and resources.[55]

1. Market Share

An assessment of the petitioner's market share in the product and geographic markets at issue is the initial step in the Commission's analysis. Whether sufficient competition has been found to exist – as measured by the petitioner's market share – has been an important factor in various Commission decisions where market power was at issue.[56] Specifically, in determining that forbearance from certain dominant carrier rules and Section 251(c)(3) unbundling obligations was not warranted the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order*, the Commission found in both cases that the petitioning ILEC's market shares in the MSAs at issue were "sufficiently high to suggest that competition in [those] MSAs is not adequate to ensure that the 'charges, practices, classifications, or regulations … for [] or in connection with that … telecommunications service are just and reasonable and are not unreasonably discriminatory' absent the regulations at issue."[57]

At the same time, the Commission has made clear on several occasions – including in the *Verizon 6-MSA Order* and the *Qwest 4-MSA Order* – that market share is an important, but not sufficient, element of its market power review.[58] As noted in the *Verizon 6-MSA Order*, when conducting a market power analysis, "the Commission does not limit itself to market share alone, but also looks to other factors including supply substitutability, elasticity of

55 *See, e.g., AT&T Reclassification Order*, at ¶ 38; *AT&T International Non-Dominance Order*; at ¶¶ 39-41.

56 *See, e.g., AT&T Reclassification Order*, at 3307.

57 *Verizon 6-MSA Order*, at ¶ 27 (citation omitted). *See also Qwest 4-MSA Order*, at ¶ 27.

58 *Verizon 6-MSA Order*, at ¶ 28 (citation omitted). *See also Qwest 4-MSA Order*, at ¶¶ 13, 28.

demand, and firm, cost, size, and resources."[59] One or more of those factors may result in a particular market share resulting in a finding of market power in one proceeding and a finding of no market power in a second proceeding.[60]

2. Market Elasticities and Structure

As noted above, market share cannot be evaluated in a vacuum. While not controlling, factors such as demand and supply elasticities, and the cost, structure, size and resources of the carrier under review are of relevance to the Commission's market power analysis. Demand elasticity refers to the willingness and ability of a carrier's customers to switch to another provider or otherwise change the amount of services they purchase in response to a change in price or quality of the service at issue.[61] High firm demand elasticity indicates customer willingness and ability to switch to another provider in order to obtain price reductions or desired features. Supply elasticity refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price.[62] As noted by the Commission in the *Omaha Forbearance Order*:

> [T]wo factors determine supply elasticity: (1) whether existing competitors have or can relatively easily acquire significant additional capacity, in which case supply elasticities are high, and (2) the absence of significant barriers to entry, be they legal (*e.g.*, government imposed restrictions), economic (*e.g.*, capital costs, economies of scale), technological (*e.g.*, a new innovation protected by a patent), or operational (*e.g.*, lack of skilled workers).[63]

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59 *Verizon 6-MSA Order*, at ¶ 28 (citation omitted).

60 *Id.*, at ¶¶ 30-31.

61 *COMSAT Reclassification Order*, at 14120.

62 *Id.*, at 14123.

63 *Omaha Forbearance Order*, at ¶ 35 (citation omitted).

Whether the carrier under review has sufficiently lower costs, size, superior resources, financial strength or technological capabilities as to "preclude the effective functioning of a competitive market"[64] may also bear on the Commission's market power determination.

The Commission routinely has recognized that market share alone does not determine whether a carrier possesses market power. As seen in various Commission orders, other factors, such as the number of facilities-based competitors present in a market and the extent to which the carrier under review controls bottleneck facilities, may have a profound influence on whether a carrier with a particular market share possesses market power. For example, in the *AT&T Reclassification Order*, the Commission found that AT&T lacked overall market power in the long-distance services market notwithstanding AT&T's market share of 60 percent.[65] The Commission's conclusion was based on its assessment of several market characteristics including, importantly, extensive evidence of actual and potential facilities-based competition from three carriers with competing national networks as well as dozens of regional facilities-based carriers, all of which collectively possessed significant excess capacity, and several hundred smaller wholesale carrier customers that used that capacity to offer competing domestic long-distance services.[66]

The Commission's determination fifteen years earlier that AT&T possessed market power rested, in part, on the fact that AT&T controlled local access facilities for over 80 percent of the nation's telephones.[67] In reversing that determination in the *AT&T Reclassification Order*, the Commission found that "conditions in the market are far different …

64 *AT&T Reclassification Order*, at 3309, ¶ 73.

65 *AT&T Reclassification Order*, at 3307.

66 *Id.*, at 3308, ¶ 70.

67 *Id.*, at 3308, ¶ 69.

AT&T has not controlled local bottleneck facilities for over ten years"[68] and "virtually all customers today … have numerous choices …"[69]

Conversely, in the *Verizon 6-MSA Order*, the Commission determined that Verizon possessed market power in the six MSAs for which it sought forbearance (and therefore should be denied forbearance) notwithstanding the fact that Verizon's overall market share in none of those markets reached the level enjoyed by AT&T at the time of the *AT&T Reclassification Order*. The Commission based its decision on the conclusion that the record in the Verizon proceeding did not show "comparable evidence of facilities-based competition."[70] The Commission determined that the market characteristics present in the AT&T proceeding "presented much more compelling evidence of the competitiveness of the marketplace … than we find for the 6 MSAs based on the record here."[71]

The Commenters suggest that in evaluating Qwest's request for forbearance from Section 251(c)(3) unbundling obligations in the Phoenix MSA, the Commission carefully consider Qwest's market share and these additional factors, especially the extent to which supply elasticities may be low. Specifically, the Commission should evaluate the extent to which competitive service providers – including the Commenters and other wireline CLECs – can easily obtain wholesale facilities and services, including last-mile capabilities, from non-ILEC sources in the Phoenix MSA at reasonable rates and terms. To the extent that such facilities and services (including last-mile access) cannot easily be purchased elsewhere on reasonable rates and terms, the Commission should recognize that Qwest may continue to possess market power.

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68 *Id.*

69 *Id.*, at 3308, ¶ 71.

70 *Verizon 6-MSA Order*, at ¶ 30.

71 *Id.*, at ¶ 28.

In addition, the Commission should closely scrutinize whether and to what extent there are economic and operational barriers that preclude the Commenters and other competitive service providers from obtaining additional capacity in the Phoenix MSA through self-supply. Established principles of market power analysis direct the Commission to consider how *existing competitors* are conducting business in the Phoenix MSA and may be impacted by a grant of forbearance to Qwest.

IV. APPLICATION OF A MARKET POWER STANDARD COMPELS DENIAL OF QWEST'S REQUEST FOR FORBEARANCE FROM UNE UNBUNDLING OBLIGATIONS

A. The Relevant Product Market And Geographic Markets

In defining product markets for purposes of a market power review, the general principle the Commission applies is to identify and aggregate consumers with similar demand patterns.[72] More specifically, the Commission distinguishes product markets based on whether the services offered to one group of consumers are adequate or feasible substitutes for the services offered to the other group.[73] As stated by the Commission: "A relevant market includes 'all products that consumers consider reasonably interchangeable for the same purposes.'"[74] In addition, the Commission considers whether firms require different assets and capabilities to successfully target one group of consumers versus another group.[75]

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72 *Omaha Forbearance Order*, at ¶ 18.

73 *SBC/Ameritech Order*, at ¶ 68.

74 *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 39 (2005). *See also Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 71 (2004).

75 *Id.*

In its petition seeking forbearance in the Omaha MSA, Qwest proposed that the Commission adopt as a single product market the market for services provided under Section 251(c) within the boundaries of the Omaha MSA.[76] The Commission rejected Qwest's broad proposal, finding that "such a wide scope of services in the proposed definition to be unworkable as a single product market, especially because the services offered to mass market customers may not be adequate or feasible substitutes for services offered to business customers."[77] The Commission instead delineated two product markets: the mass market (comprised of residential and small business customers) and the enterprise market (comprised of medium and large business customers).[78]

The Commenters recommend that the Commission adopt two product markets for purposes of conducting its UNE forbearance analysis in the instant proceeding: the residential market and the business market.[79] Residential customers have different service needs and engage in a different decision-making process than do business customers.[80] Residential customers typically require basic voice capability and have lesser data demands, whereas business customers, on the whole, have higher volume, sophisticated voice and data needs. Residential customers are served through mass marketing techniques, including regional advertising, and typically do not enter into long-term agreements, while businesses of all sizes

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76 *Omaha Forbearance Order*, at ¶ 21.

77 *Id.*

78 *Id.*, at ¶ 22. *See also ACS Dominance Order*, at ¶ 17.

79 As noted in the *Qwest 4-MSA Order*, the Commission to date has declined to "formally define product markets pursuant to a market power analysis for purposes of [its] UNE forbearance analysis …" *Qwest 4-MSA Order*, at n.129.

80 *SBC/Ameritech Order*, at n.146.

tend to be served under individual, multi-year contracts marketed and administered through direct sales contacts.

The network facilities, technological resources, and administrative capabilities needed to provide service vary considerably between residential and business customers. Consequently, service providers tend to focus their marketing efforts on one or the other group of customers and do not target both equally.[81] Additionally, as an administrative matter, much of the competitive data that is so important to the Commission's UNE forbearance analysis is collected and compiled on a residential/business basis.[82] Finally, the Qwest petition itself maintains a clear line between residential and business customers even though it uses the enterprise market and mass market nomenclature.

In short, the services purchased by residential and business customers, as well as the assets and capabilities necessary to serve them, are not substitutable. Thus, residential and business customers belong in different product markets for purposes of the Commission's Section 10 analysis.[83]

In the *Omaha Forbearance Order*, the Commission concluded that the appropriate geographic market for its forbearance analysis was the Qwest service territory within

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81 They certainly do not market to both groups in a single campaign. Indeed, Qwest's website promoting its retail products maintains a clear distinction between residential and business customer services.

82 On a number of occasions, Commission staff has recognized this fact and requested that cable competitors produce line count information separately for their business and residential customers. *See, e.g.*, Letter from J.G. Harrington, Counsel to Cox Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Jun. 17, 2008).

83 Should the Commission decide to retain the mass market and enterprise market product market categories used in its previous analyses, however, the Commenters suggest that for purposes of its UNE forbearance review, the Commission define mass market to include only residential customers and the enterprise market to include all business customers.

the Omaha MSA.[84] In subsequent forbearance orders, the Commission followed the same course, holding that the petitioning ILEC's service territory within an MSA was the proper geographic market upon which to base its Section 10 analysis since "the record indicates [no] compelling reasons to narrow it."[85] The Commenters agree that, on remand, the *Verizon 6-MSA* and the *Qwest 4-MSA* forbearance reviews should be conducted on an MSA-wide basis and that the instant proceeding – and any subsequent dockets in which the ILEC seeks forbearance from UNE obligations in its service area within a particular MSA – also should be evaluated on that basis.

B. Relevant Data Must Be Collected From All Current And Potential Suppliers

Clearly, a comprehensive assessment of whether the petitioning party continues to possess market power in a specific product and geographic market cannot be made unless all data regarding market participants is presented for review and analysis. The petitioning party bears the burden of identifying and (to the extent possible) producing all such information that it deems relevant to the Commission's analysis.[86] It is vitally important that all actual and potential suppliers in a particular product and geographic market be identified at the commencement of a Section 10 forbearance proceeding and that all data necessary to evaluate each supplier's presence (or potential presence) in the market be placed in the record and made available to the Commission and interested parties in a timely manner.

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84 *Omaha Forbearance Order*, at ¶¶ 23-24.

85 *Verizon 6-MSA Order*, at ¶ 22. *See also Qwest 4-MSA Order*, at ¶ 15; *ACS Dominance Order*, at ¶ 32.

86 *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56 (rel. Jun. 29, 2009) ("*Forbearance Rules Order*"), at ¶ 20.

Recently, the Commission recognized the importance to its Section 10 analysis of complete, accurate and timely data regarding the nature and extent of competitive activity as well as the responsibility of the petitioning party to produce such information.[87] In formulating its new procedural rules for the conduct of forbearance proceedings, the Commission included a "complete-as-filed" requirement to ensure that a petitioner for forbearance produces all data or information it intends to rely on – including, importantly, data regarding all actual and potential competitors in a particular market – with its petition.[88] Moreover, to the extent a petitioner seeks to rely on information in the possession of third parties, the petitioner must identify the data or information sought and the parties that possess it.[89]

In its petition and accompanying materials, Qwest has proffered a variety of general information on the entities it contends are competing today on the wholesale and/or retail level in the Phoenix MSA. As discussed in more detail below, Qwest's showing suffers from a host of shortcomings. First, the data is largely anecdotal. Qwest urges the Commission to grant forbearance from UNE obligations on the basis of promotional materials, marketing statements, and broad generalizations concerning the state of competition in the Phoenix MSA. Reliance on this type of information to justify forbearance would result in a disposition of Qwest's petition that is not properly grounded in reality.

Second, the limited empirical data that Qwest has actually produced is either too generic, too conclusory, or is not subject to verification. These defects render the data essentially useless to the Commission's forbearance analysis and prove that Qwest has not made the required *prima facie* showing. For example, Qwest employed the research firm Harte-Hanks to

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87 *See Forbearance Rules Order, supra.*

88 *Id.*, at ¶¶ 16-19. *See also* 47 C.F.R. § 1.55.

89 *Forbearance Rules Order*, at ¶ 17.

provide business market share data for the Phoenix MSA. According to Qwest, "Harte-Hanks conducted extensive interviews with over 1,500 business customers in the Phoenix MSA to determine what telecommunications services the customers are purchasing, and which carrier(s) the customers are purchasing the services from."[90] Qwest has produced the claimed results of the Harte-Hanks survey but those results consist of a single chart with no explanation or description of the methodology used to conduct the survey or compile the results.[91] In addition, Qwest has produced data from GeoTel purportedly showing the general location of competitive fiber in the Phoenix MSA and the competitive fiber-lit buildings within the greater Phoenix area.[92] Unfortunately, this data is not sufficiently disaggregated to be of any use.

Qwest notes that there is some relevant data that it "has no ability to obtain"[93] and it urges the Commission to seek such data "directly from the CLECs serving the Phoenix MSA – at a minimum from the largest CLECs serving the Phoenix MSA – Cox, AT&T, Verizon, Integra, tw telecom, PAETEC/McLeod and XO."[94] The Commenters recognize the importance to the Commission's UNE forbearance analysis of having complete, reliable, and up-to-date data on the precise nature, location, and extent of facilities-based competition in the product and geographic markets at issue. Where such information is not available to Qwest and is not offered voluntarily, the Commission should require the production of such data. In past UNE forbearance dockets, to the full extent they possessed such information, the Commenters have

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90 *Second Phoenix Petition*, at 27.

91 *Second Phoenix Petition*, Declaration of Robert H. Brigham Regarding the Status of Telecommunications Competition in the Phoenix, Arizona Metropolitan Statistical Area ("*Brigham Declaration*"), at ¶ 33 and Confidential Exhibit 6.

92 *Second Phoenix Petition*, at 30-31 and Confidential Exhibits 8A and 8B.

93 *Second Phoenix Petition*, at 26.

94 *Id.*, at 30.

willingly and voluntarily submitted it on the record.[95] In keeping with this approach, these comments include data from XO Communications, LLC, one of the CLECs named by Qwest in the instant petition regarding its facilities-based operations in the Phoenix MSA. The Commenters urge all other facilities-based competitors with relevant empirical evidence to make such information available to the Commission and interested parties as soon as possible.[96]

C. The Commission Must Determine, Separately For Each Product Market, Whether Qwest Continues To Possess Market Power

Without question, the market power determination is the heart of the Commission's analysis. Market power is assessed based on the state of competition in the product and geographic market at issue.[97] As shown in Section V below, Qwest has utterly failed to prove that there is sufficient facilities-based competition in any product market in the Phoenix MSA.

V. THE STATE OF FACILITIES-BASED COMPETITION IN THE ENTERPRISE MARKET IN THE PHOENIX MSA DOES NOT JUSTIFY A FINDING OF NO MARKET POWER

In the course of seeking forbearance in the *Qwest 4-MSA* docket, Qwest failed to demonstrate that the various competitive providers it listed represented a sufficient measure of facilities-based competition to warrant relief under the Commission's forbearance analysis. Despite the passage of two years, Qwest once again fails to make the case that there is a

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95 *See, e.g.,* Letter from Brad Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 23, 2008) ("*CLEC Data Ex Parte*"); Letter from Genevieve Morelli, Counsel to XO Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed May 20, 2008) ("*XO Data Ex Parte*").

96 Of course, this does not absolve Qwest from the burden to establish a *prima facie* case that forbearance is warranted, to produce all data in its control, and to identify all data from third parties that it believes is relevant to its case.

97 *See, e.g., Omaha Forbearance Order*, at ¶ 25.

sufficient facilities-based competitive presence to justify forbearance from Section 251(c)(3) UNE unbundling obligations.

Qwest takes little care in distinguishing retail competition in general from facilities-based competition, either retail or wholesale. Yet the presence of facilities-based competition is the touchstone of the requisite forbearance analysis. To the extent there is some actual competition in Phoenix today (and the Commenters do not contend there is none), Qwest is largely silent regarding the extent to which the competitive entities that provide service are using their own facilities in contrast with depending heavily upon the very UNEs for which Qwest is seeking forbearance.[98] The Commission stated emphatically as early as the *Omaha Forbearance Order* that:

> Forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that is today benefiting customers in the Omaha MSA.[99]

In 2008, when denying Qwest's petition for forbearance from unbundling obligations in Phoenix and three other of its largest markets, the Commission repeatedly

98 In the *Omaha Forbearance Order*, the Commission found it crucial that the primary competitor to Qwest was "successfully providing local exchange and exchange access services *without relying on Qwest's loops and transport*." *Omaha Forbearance Order,* at ¶ 64 (emphasis supplied).

99 *Omaha Forbearance Order,* at ¶ 60. In the *Anchorage Forbearance Order*, the Commission found the extent to which ACS's competitor, GCI, has constructed last-mile facilities to be highly relevant to its forbearance analysis and limited its grant of forbearance to "those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a)." *Anchorage Forbearance Order*, at ¶ 21. *See also id.*, at ¶ 23 ("Forbearing . . . where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.").

underscored the need for Qwest to demonstrate the presence of sufficient last-mile facilities deployed by its competitors in the geographic markets at issue (as well as its failure to do so). On the one hand, the Commission found that "[t]he evidence also shows ... that, in serving mass market and enterprise customers, [Qwest's] intramodal competitors rely significantly on access to Qwest's last-mile network facilities, including UNEs, and Qwest's other wholesale services in all four MSAs."[100] On the other hand, the Commission concluded that "the record [fails to] reveal that other competitors in these MSAs have deployed their own extensive last-mile facilities for use in serving the enterprise market."[101]

The need for an ILEC to demonstrate actual facilities-based competition within the relevant geographic market is true when petitioning for forbearance from unbundling requirements regardless of the specific legal standard that is applicable. Under a market power analysis, as advocated herein, both actual and potential market analyses are required for both retail and wholesale markets. Nonetheless, Qwest provides scant empirical evidence regarding the existence of actual facilities-based (*i.e.,* non-UNE or Qwest wholesale services-based) last-mile competition in the relevant geographic market – the Phoenix MSA – for the business product market on either a retail or a wholesale basis. Qwest's deficiency in data speaks volumes and demonstrates that forbearance is still not warranted.

As further shown below, Qwest has failed to provide sufficient evidence of the actual wholesale or retail *facilities-based* competition that is the absolute prerequisite to a finding that the consumer protection requirements of Section 10(a) have been met and the grant of forbearance in the Phoenix MSA is justified. The evaluation of Qwest's request must be founded

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100 *Qwest 4-MSA Order*, at ¶ 16.

101 *Id.*, at ¶ 36.

upon facilities-based competition, and not simply on competition at the retail level in general, a tenet which Qwest conveniently forgets again and again, as detailed below. Thus, for example, Qwest's introductory reference to telephone survey results obtained on Qwest's behalf by the research firm of Harte-Hanks are completely beside the point. As Qwest explains, the survey indicated that Qwest is considered by business end users with five or more employees as the primary carrier between *****BEGIN CONFIDENTIAL***** *****END CONFIDENTIAL***** of the time.[102] But the survey results as presented by Qwest, in addition to the deficiencies discussed in Section IV.B, *supra*, provide no insight whatsoever into the amount of facilities-based competition in the enterprise market, which is the proper focus of the Commission's analysis in considering Qwest's forbearance request.

As detailed below, Qwest fails to demonstrate the presence of adequate facilities-based competition to business customers to justify the UNE forbearance requested.

A. Cable Competition

Qwest relies heavily on the presence of cable competition in the Phoenix MSA.[103] While offering generalities regarding the scope of competition in the business market from Cox, Qwest largely fails to provide the Phoenix-specific, granular data necessary to measure and evaluate the presence of facilities-based competition in that market from this cable company. Instead, Qwest relies upon insufficient and overly-broad representations (and estimates) of competition by Cox *nationally*. This type of presentation makes it largely impossible to discern the extent of actual facilities-based competition from cable in the Phoenix MSA. For example, Qwest states generally that Cox "competes vigorously with Qwest in the business market,

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[102] *Second Phoenix Petition*, at 27. *See also Brigham Declaration*, Confidential Exhibit 6.

[103] *Second Phoenix Petition*, at 13-16, 26-27.

providing a broad range of business products to small business and enterprise customer of every size in the MSA."[104] In support, Qwest points to the fact that Cox has apparently established a separate marketing division "focused specifically on the small, medium, and enterprise business market segments,"[105] but Qwest has no Phoenix-specific data to provide about the competition presented by Cox.

Significantly, in the end, Qwest has to concede that it is without hard data regarding the extent to which Cox serves customers in Phoenix using its own facilities or the numbers of commercial buildings that Cox has lit (let alone the extent to which Cox serves each of those buildings, *e.g.*, one customer, one or more floors, or the entire building).[106] Given the need to demonstrate actual competition on a facilities-basis and the dearth of information regarding effective facilities-based competition from Cox in Phoenix in the business market, the Commission cannot grant Qwest the requested forbearance from unbundling requirements based on the current record. The Commenters look forward to the opportunity to evaluate such data if and when it becomes available.

Qwest also fails to address the points made by Cox in its comments on Qwest's earlier attempt to obtain forbearance in the Phoenix MSA. Cox explained that it is not franchised to provide cable services in the entire Phoenix MSA.[107] Qwest has offered no evidence that this situation has changed. Further, Cox noted that it does not provide telephone service throughout the entire MSA and questioned Qwest's failure to identify in which of its wire centers Cox has

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104 *Id*, at 27-28.

105 *Id.,* at 28 (emphasis in original).

106 *Id.*

107 Comments of Cox Communications, Inc., WC Docket No. 07-97 (filed Aug. 31, 2007), at 21.

deployed facilities.[108] Qwest has taken no steps to address these deficiencies in its second petition.

In addition to Qwest's failure to address the concerns described above, Qwest ignores other problems inherent to cable-based provision of services to the business market in Phoenix due to a lack of physical proximity, technical inability, or both.[109] To the extent Cox has deployed some amount of fiber or other infrastructure within the Phoenix MSA that can support high-capacity telecommunications services, they can only serve businesses within close proximity to their existing coaxial network,[110] a current operational reality which cautions against any broad conclusions regarding the "vigor" of competitive business services offered by Cox without engaging in a more detailed analysis. What the New York State Department of Public Service Staff stated four years ago still holds true today:

> [C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not 'cabled-up' (i.e. current cable-based services are television rather than voice driven) and larger businesses generally have T-carrier systems for their telecommunications needs . . .[111]

Qwest offers no hard evidence that Cox is providing extensive facilities-based telephony services to business customers in Phoenix today. Instead, Qwest relies on Cox's promotional materials and broad, non-market specific generalizations. As it did two years ago

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108 *Id.*

109 Based on industry norms, business customers for standard "off-the-shelf" services expect to receive service within 30 calendar days.

110 Indeed, the Cox promotional material quoted at length in the *Brigham Declaration* makes clear the ability to provide T-1s at a reasonable cost where there is already a coaxial feed. *Brigham Declaration,* at ¶ 35.

111 *See Department of Public Service Staff White Paper*, Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission, (Jul. 6, 2005) ("*NYS Staff White Paper*"), at 31.

when seeking relief in the *Qwest 4-MSA* proceeding, Qwest relies solely on the presence of the franchised cable networks in each MSA as evidence that the cable companies possess "the necessary facilities to provide enterprise services."[112] Qwest presupposes that, should the Commission require Cox to provide data regarding its access lines and network, the data will make Qwest's case for Qwest. There is no reason to presume this in advance.

To the extent that Cox relies on its hybrid fiber/coaxial cable system rather than other modes of delivery to provide telecommunications services to business customers, cable system technology still faces serious operational hurdles before it can be used to provide business-level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Indeed, based on information available to XO, the Commenters believe that Cox is providing business products on a facilities-basis to tenants in no more than about *** **BEGIN HIGHLY CONFIDENTIAL*** ***END HIGHLY CONFIDENTIAL*** within Phoenix, out of the approximately 133,000 commercial buildings[113] within the MSA, *well below* *** **BEGIN HIGHLY CONFIDENTIAL*** ***END HIGHLY CONFIDENTIAL*** of commercial buildings.

Within many of those buildings Cox's network does reach, Cox may only be serving, or be capable of serving without significant additional investment or securing of rights

112 *See Qwest 4-MSA Petition –Phoenix*, at 21-22.

113 Information obtained by the Commenters from GeoResults for these comments identifies 133,435 commercial buildings in the Phoenix MSA. This information updates data obtained from GeoResults in April 2008 for WC Docket No. 07-97, which identified 127,763 commercial buildings in the Phoenix MSA. *See* Letter from Brad Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed April 23, 2008) ("*April 23rd Letter*").

from the owner or landlord, a small subset of tenants, and only certain floors. In order to provide business-level telephony services on a scale which might warrant serious consideration of a forbearance request, the Commenters submit that it is probable that Cox would first have to make significant additions to its network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of business-level services they can accommodate and the competitive presence that they represent.

Cox's business level services are subject to other constraints. The services to a building have a limited capacity if provided over Cox's core cable network. Based on the Commenters' experience with cable operators nationally, and XO's experience with Cox in the Phoenix MSA in particular, Cox's present hybrid fiber/coaxial network cannot readily support more than a T-1 level of capacity over a given access line. Moreover, the extent of competition Cox can bring to any building from cable-based T-1 service is based on the number of such lines present on the lateral build. There is limited capacity through any such facility and while a T-1 may, if it is not competing for that capacity with other customers, perform near that level, the service quickly becomes degraded as other customers whose service relies on the same node or head end use their service simultaneously.[114]

Thus, whereas business customers might try Cox services where they are available, they are not necessarily a first choice if provided in this manner, which does not ensure business customers have designated facilities and capacity. More information is required from Cox before the Commission and interested parties can ascertain the extent to which Cox offers

[114] In fact, the disclaimer on Cox's website for Business Internet(SM) service states that "Cox cannot guarantee uninterrupted or error-free Internet service or the speed of your service ... Actual modem speeds vary. Number of users or network management needs may require Cox to modify upstream and/or downstream speeds. Other restrictions apply." *See* http://ww2.cox.com/business/northernvirginia/data/business-internet.com.

its business services using non-dedicated facilities. Based upon the record developed by Qwest, the Commission cannot find that there is sufficient competition from cable companies in the business market to support forbearance from UNE obligations in the Phoenix MSA.

B. Competition From CLECs

Qwest attempts to justify UNE forbearance in the business market within Phoenix on the purported existence of "at least 30 unaffiliated CLECs actively competing with Qwest for business customers in the Phoenix MSA."[115] Qwest provides some data regarding the scale of access lines served by its competitors. Significantly, however, Qwest fails to provide any data regarding the extent of competition in the business market from CLEC-owned last-mile facilities. Indeed, Qwest acknowledges that its data "*excludes* access lines served via (1) entirely CLEC-owned network facilities, (2) network facilities leased from non-Qwest providers, and (3) the purchase of Special Access service from Qwest."[116] "Entirely CLEC-owned network facilities" and "network facilities leased from non-Qwest providers" serving the last mile are the very data needed by the Commission to evaluate Qwest's petition for forbearance from unbundling obligations. Consequently, Qwest's petition fails to demonstrate that CLECs do not remain heavily dependent on unbundled network elements, especially unbundled loops and EELs. This is definitely the case for XO, one of the Commenters, as detailed further below.

In fact, the petition actually provides a strong demonstration just how important continued provision of UNEs is to maintaining the current levels of competition in Phoenix. Qwest notes that it provides competitors with "over ***BEGIN HIGHLY**

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115 *Second Phoenix Petition*, at 28.

116 *Id.*, at 28-29 (emphasis in original).

CONFIDENTIAL* *** END HIGHLY CONFIDENTIAL*** equivalent business lines,"[117] the overwhelming number of which are unbundled facilities.

Qwest acknowledges that only ***BEGIN HIGHLY CONFIDENTIAL*** *** END HIGHLY CONFIDENTIAL*** of the CLECs, or ***BEGIN HIGHLY CONFIDENTIAL*** *** END HIGHLY CONFIDENTIAL*** of the number that Qwest touts, serve at least some of their business customers using their own facilities.[118] Yet Qwest's petition provides none of the critical, and significantly more relevant, information regarding the extent to which these competitors are using their own loop facilities to reach business customers as opposed to Qwest facilities. This showing is absolutely critical if Qwest is to meet its burden in seeking forbearance of its unbundling requirements. And although Qwest contends that ***BEGIN HIGHLY CONFIDENTIAL*** *** END HIGHLY CONFIDENTIAL*** of the CLECs use Qwest QLSP finished wholesale services and ***BEGIN HIGHLY CONFIDENTIAL*** *** END HIGHLY CONFIDENTIAL*** resell Qwest's finished services, the data Qwest includes with its petition makes clear the minimal impact on retail competition these two wholesale alternatives have made relative to unbundled facilities. Highly Confidential Exhibit 7 to Qwest's petition demonstrates that, as of December 31, 2008, resale by CLECs accounted for only ***BEGIN HIGHLY CONFIDENTIAL***

*** END HIGHLY CONFIDENTIAL*** On the other hand, this same Exhibit shows that ***BEGIN HIGHLY CONFIDENTIAL***

*** END HIGHLY CONFIDENTIAL*** incorporate unbundled loops or EELs.

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117 *Id.*, at 29.

118 *Id.*, at 28-29.

Qwest absolutely fails to address the extent to which the *****BEGIN HIGHLY CONFIDENTIAL***** *** **END HIGHLY CONFIDENTIAL***** CLEC fiber networks reach, and can support, the offering of a full range of services, within a commercially reasonably period of time, to individual customer locations in the Phoenix MSA. Qwest erroneously assumes that merely passing a customer location with backbone fiber facilities necessarily enables the owner of competitive fiber to provide service at that customer location.[119] This would explain Qwest's excessive reliance in the petition on the number of fiber miles deployed by the various competitors.[120] While some competitive carriers have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings. Carriers must construct building "laterals" to serve customers located in those commercial buildings. The construction of laterals, even of relatively short length, is extremely difficult, time consuming, and costly. According to XO, the extraordinary costs of constructing laterals results in XO not being able realistically to add a building to its network unless customer demand at that location exceeds three DS-3's of capacity.[121]

Qwest claims that competitive fiber is now in place in over *** **BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** commercial buildings in the Phoenix MSA. Not only is this fewer than *** **BEGIN HIGHLY**

119 *See, e.g., Second Phoenix Petition*, at 31; *Brigham Declaration*, Confidential Exhibits 8A and 8B.

120 *See Second Phoenix Petition*, at 30 ("According to GeoTel, approximately *** **BEGIN CONFIDENTIAL***** 3000 *****END CONFIDENTIAL***** miles of fiber, owned by approximately 25 unaffiliated providers is now in place in the Phoenix MSA."); *see generally id.*, at 31-38.

121 *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, *Declaration of Ajay Govil on Behalf of XO Communications, Inc.* (filed Aug. 8, 2007), at ¶19 ("*Govil Declaration*").

CONFIDENTIAL*** *****END HIGHLY CONFIDENTIAL***** of the more than 133,000 commercial buildings in the Phoenix MSA, this is a gross overstatement of reality. XO, in its efforts to obtain fiber from alternate sources, has obtained confidential information subject to non-disclosure arrangements regarding what it believes are the seven largest competitive networks in the Phoenix MSA, plus its own network,[122] and the number of lit commercial buildings is, in the aggregate, no more than on the order of *** **BEGIN HIGHLY CONFIDENTIAL***** *** **END HIGHLY CONFIDENTIAL***** buildings.[123] Further, even this number is an overstatement in that it double-counts those buildings to which two or more competitors have brought fiber.

The GeoResults data for the Phoenix MSA reveals that only a few hundred commercial buildings in the Phoenix MSA, out of more than 133,000 commercial buildings, are "CLEC Lit Commercial Buildings."[124] More specifically, the data shows that only 0.19% of commercial buildings are lit by CLECs, which amounts to fewer than 270 buildings. The GeoResults data also examines the question of whether the limited number of buildings served by CLECs account for a disproportionate percentage of total demand. Even assuming any CLEC has the ability to serve the total demand in any commercial building to which it has any facilities (an unrealistic assumption), there are no wire centers in the Phoenix MSA where CLECs have Addressable Demand Market Share in excess of 10%. In addition, the GeoResults data shows

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122 XO currently has lit at least a portion of *** **BEGIN HIGHLY CONFIDENTIAL***** *** **END HIGHLY CONFIDENTIAL***** buildings within the Phoenix MSA.

123 The principal reason for the discrepancy, the Commenters submit, is that Qwest's number likely includes apartment buildings and other residential multi-unit dwellings ("MDUs") served by the cable operator.

124 A "CLEC Lit Commercial Building" is defined as any Commercial Building that has fiber-enabled network office equipment that has been placed there by one or more CLECs, which generally indicates that a CLEC has deployed its own fiber or has a long-term lease of dark fiber to that building. *See April 23rd Letter, supra.*

that in 55 of the 72 wire centers in the Phoenix MSA, CLECs have Addressable Demand Market Share of less than 1%.

In reality, however, the lighting of a commercial building by a competitive provider does not mean that all tenants within a building can be accessed by the competitive fiber that has been brought to the property. Competitors often, if not predominantly, bring fiber to a building to serve particular tenants. This means that the fiber typically is not available to other CLECs wishing to serve separate commercial tenants within the same building. Thus a CLEC, even if it can use another competitor's fiber to get to a point on the property, will have to obtain the rights from the property owner to access the particular floor or premise it seeks to serve and make the additional investment needed to reach that space. In contrast, the ILEC historically has more commonly wired the entire building and can support competitive access to any tenant through unbundled loops without additional investment.

Qwest, cognizant of the shortcomings of the CLEC-related data it has presented to the Commission, asks the Commission to seek access line data from CLECs serving the Phoenix MSA.[125] Specifically, Qwest suggests that the Commission obtain information regarding the number of business customers each serves and the number of access lines. The Commenters submit that these particular categories of data would not be particularly meaningful or helpful to address Qwest's request for forbearance. Instead, the Commission should request information from CLECs regarding the number of commercial lit buildings served (with business-level customers) and the business lines provided to business level customers using self-provisioned last-mile connections.

125 *Second Phoenix Petition*, at 30.

C. Competition from VoIP Providers

In addition to cable and wireless services, Qwest points to VoIP services ("VoIP") in its attempt to demonstrate sufficient competition to warrant forbearance in the business market.[126] In its request for forbearance in the *Qwest 4-MSA* proceeding, the ILEC did not look to competition from VoIP providers to support its request. In the instant petition, Qwest fails to provide any meaningful data that circumstances have changed and VoIP providers in the Phoenix MSA provide actual *facilities-based* last-mile alternatives to Qwest. Moreover, Qwest fails to provide take rates or any other specifics regarding the success of stand-alone VoIP providers within the Phoenix MSA, and with business customers in particular. Instead, Qwest merely refers to nationwide promotional literature of several VoIP providers to substantiate its claims that VoIP providers make a meaningful contribution to competition in the Phoenix MSA for purposes of a forbearance analysis.[127] Thus, the Commission should exclude VoIP providers as contributors to facilities-based last-mile competition in Phoenix.

Further, while a number of carriers serving the business market in Phoenix, including XO, are beginning to integrate VoIP into their overall package of business services, these VoIP offerings typically are part of a larger service bundle of the type increasingly demanded by business customers and which stand-alone VoIP providers simply cannot match. As such, these carriers' VoIP services do not provide a separate source of facilities-based competition from their fiber networks accounted for elsewhere, as complemented by wholesale offerings, including UNEs, purchased from Qwest. Moreover, in the business market, stand-alone VoIP providers are not material to the forbearance analysis because customers interested in

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126 *See id.*, at 32. As with wireless services, Qwest does not rely on over-the-top VoIP ("O/VoIP") services to demonstrate competition in the business market.

127 *See Brigham Declaration*, at ¶¶ 46-48 and nn.105-113.

IP-enabled capabilities need to integrate them into a larger suite of business services to meet their complex and diverse requirements. As such, stand-alone VoIP services are simply not an independent source of facilities-based competition.

Moreover, Qwest has provided no empirical data regarding the extent to which VoIP services are being provided over Qwest's facilities versus the facilities of other facilities-based carriers in Phoenix. Thus, the Commission should not (and cannot) include the retail market presence of VoIP providers in its analysis as a separate source of information regarding, or basis for, whether there is sufficient facilities-based competition to warrant forbearance from Section 251(c)(3) unbundling obligations in the business market in the Phoenix MSA.[128]

D. **Wholesale Market Alternatives**

Qwest also attempts to justify its forbearance requests for the business market on the basis of purported wholesale alternatives to the use of its Section 251(c)(3) network elements.[129] Several Commissioners noted in the *Verizon 6-MSA Order* that a duopoly environment founded on competition between a cable operator and the ILEC is not adequate to

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128 O/VoIP should not factor into any forbearance analysis where unbundling regulations are at issue. By definition, O/VoIP rides the facilities of another provider, which in many cases is likely to be Qwest itself. More specifically, O/VoIP calls rely on an underlying broadband connection that in many cases is obtained from Qwest. Therefore, to include any O/VoIP in a forbearance analysis of competition would be double-counting. Were the Commission to rely on competition from such providers, it could lead to the anomalous and unsound result that a grant of forbearance from Section 251(c)(3) unbundling obligations would undermine the ability of O/VoIP providers to continue to operate, by restricting the ability of carriers that rely on ILEC copper loops to offer broadband services to their customers from participating in the broadband market. *See, e.g.,* Comments of the Virginia State Corporation Commission, WC Docket No. 06-172 (filed Dec. 15, 2006), at 7-8.

129 *See Second Phoenix Petition*, at 33-39. Qwest does not contend, as it did in its earlier 4 MSA petition, that forbearance from Section 251(c)(3) unbundling requirements is appropriate in the business market in Phoenix because competitors are using Qwest's special access services to serve enterprise customers.

ensure sustainable competition in the absence of regulation.[130] Experience has shown that the presence of multiple wholesale facilities-based alternatives independent of the ILEC is a vital component of ensuring that a competitive market will be maintained if a decision is made to forbear from enforcing an ILEC's unbundling obligations is made. In the *Omaha Forbearance Order,* the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a cable/ILEC duopoly in the Omaha MSA.[131] The Commission predicted that, in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding the development of a Qwest/Cox duopoly.[132]

Unfortunately, the Commission's predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), a former competitor in the Omaha MSA dependent on access to Qwest's last-mile facilities, has petitioned the Commission to reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission's "'predictive judgment' that Qwest would offer wholesale access to dedicated facilities on reasonable terms

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130 *See* Statement of Commissioner Michael J. Copps, Concurring, *Verizon 6-MSA Order* ("The Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace."); Statement of Commissioner Jonathan S. Adelstein, Concurring, *Verizon 6-MSA Order* ("Finally, as I've stated before, I continue to believe that the Act contemplates a competitive environment based on more than a simple rivalry – or duopoly – of a wireline and cable provider.").

131 *Omaha Forbearance Order*, at ¶ 71. The Commission explained its belief that "the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under Sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct." *Id.*

132 *Id.*, at ¶ 67.

and conditions once released from the legal mandate of Section 251(c) has proven incorrect."[133] McLeodUSA detailed it made repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and that "Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers."[134] Ultimately, McLeodUSA made the decision that, in the absence of unbundling and wholesale alternatives, it had to leave the Omaha market.

In short, if Qwest and a single competitor maintain the only last-mile facilities available to serve customers, there is no evidence to support the prediction that, if Section 251(c)(3) forbearance is granted, a sustainable wholesale market will develop or that the retail market behavior of the two carriers will deviate at all from the behavior of Qwest and Cox in Omaha. In that circumstance, without the clear presence of substantial competitive facilities-based wholesale alternatives from multiple competitors, Section 251(c)(3) forbearance certainly is not warranted.

To this end, Qwest relies on the wholesale offerings of several carriers in particular, including Cox, SRP telecom, AGL Networks, Integra, AT&T, XO, Level 3, tw telecom, AboveNet, and 360 Networks. Qwest claims that the overall fiber coverage of the Phoenix MSA by these wholesale providers is extensive.[135] Yet Qwest overlooks that fact that, today, these providers access with their own facilities substantially fewer than 1000 commercial buildings, without even accounting for double counting, as explained above. Moreover, when a

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133 *See In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) ("*McLeodUSA Petition*"), at 1.

134 *Id.*, at 4. At the same time, Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeodUSA and other competitive carriers.

135 *Second Phoenix Petition*, at 38.

competitor lights a building, this does not mean that the property owner or manager has given the carrier access to serve the entire building. Rather, access may be limited to certain tenants or certain floors, whereas Qwest alone is much more likely to have access to the entire building.

Further, as explained in Section V.B above, adding buildings to a network is not as straightforward as Qwest maintains. There are considerable costs associated with adding "near net" buildings, and there must first be a business case for doing so. As detailed above, XO will consider adding a building only when customer demand equals or exceeds 3 DS-3s of capacity, due to the costs associated with construction, rights of way access, building access, and other matters.[136] While Qwest attempts to paint a rosy picture of the impact alternative facilities providers are having on enterprise competition within the Phoenix MSA, a closer look at these providers reveal their limited suitability as a source of leased facilities for competitive carriers.

The Commenters explained in Section V.A above, the limited impact Cox has had in the business market and the continued unsuitability of its network to support business services throughout much of the Phoenix MSA. These same shortcomings in its provision of retail services carry over to its role as a provider of wholesale services within the Phoenix MSA. In short, in addition to Cox's limited geographic reach to commercial properties, Cox's hybrid coaxial cable network where it is present in commercial buildings is still unsatisfactory for serving demanding business customers with high capacity needs, especially those with needs in excess of T-1 circuits.[137] Moreover, XO cannot use Cox's Ethernet services to provide service to its own customers for a number of reasons. First, Cox's Switched Ethernet Private Line and Ethernet Virtual Private Line circuits are not provided on a dedicated basis, which means that

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[136] *See Govil Declaration, supra,* at ¶¶ 14-19.

[137] *See* Section V.A, *supra.*

they are susceptible to throughput degradation. XO's business customers require dedicated, "always on" connectivity. Second, Cox does not currently offer 10MB services, which is XO's most popular level of service to business customers. Third, Cox's Maximum Transition Unit (MTU) size is 1522 bytes, which differs from the MTU industry standard of 1544 bytes to which XO adheres. Consequently, attempts to use Cox's Ethernet service to support XO business customers would create interoperability issues and frustrate tracking, reporting, and efficient responses to trouble tickets. Finally, Cox's offered service levels of 99.9% is considerably below XO's standard for business customers, which is 99.999%.

Qwest claims that "SRP [Telecom] provides a viable option for carriers that seek an alternative access solution to the use of Qwest's network in the Phoenix MSA."[138] XO, the Commenter with a facilities-based presence in Phoenix, notes that it does not use SRP and does not consider SRP a viable option for wholesale transport and, especially, loops. The SRP network was built to provide communication between electrical transmission sub-stations, a fact which severely constrains SRP's potential usefulness as a wholesale resource for competitive telecommunications providers serving business customers. As a consequence, SRP's facilities are on electrical system transmission routes – not distribution routes – and are located above SRP's high-voltage electrical facilities.

Because of the configuration of the SRP network on the electric utility transmission network, a carrier such as XO has very limited access to those facilities – typically only at power substations.[139] Only trained power technicians can add splices, maintain, and

138 *Second Phoenix Petition*, at 34-35.

139 While SRP offers access to approximately 35 buildings, based on the configuration of SRP's network and its other shortcomings, as detailed herein, XO does not expect SRP to significantly expand its reach of last-mile facilities in the near term.

repair facilities. Moreover, there are unacceptable constraints for a telecommunications carrier regarding when this work can be done. Electric power must be shut down to access and work on the SRP telecommunications facilities, which means that SRP must first reroute power from the affected locations to avoid black-outs when servicing a wholesale telecommunications carrier customer. In addition, a carrier must rely completely on SRP Telecom for access to the facilities given their locations on the SRP infrastructure. Consequently, a telecommunications carrier cannot easily install drops to customer or building locations (leaving aside the other difficulties and significant costs in constructing laterals) or other carrier network locations from the SRP facilities, which minimizes the utility of the SRP network as a wholesale alternative for carriers in Phoenix. Further, the Commenters understand that SRP offers no Quality of Service ("QOS") guarantees for its telecommunications services or facilities, and no Service Level Agreements. Thus, in the final analysis, for the technical, operational, and economic reasons explained here, SRP is an unsuitable – if not impossible – alternative for carriers serving the business market today.

AGL Networks ("AGL") is another supplier of wholesale inputs on which Qwest heavily relies in its petition as a source of competitive alternatives to unbundled loops.[140] XO has plans to use AGL on a limited basis, *****BEGIN HIGHLY CONFIDENTIAL *****

*****END HIGHLY CONFIDENTIAL*****[141] While AGL provides "last mile" connectivity to approximately 75 buildings in the Phoenix MSA, AGL's network is of limited utility as a source

140 *Second Phoenix Petition*, at 35.

141 Highly Confidential Declaration of Bryan Burns, Network Manager, XO Communications, LLC, Sept. 21, 2009 ("*Burns Declaration*"), appended hereto as Appendix A, at ¶ 7, 8.

of competitive alternatives to serve business customers in Phoenix.[142] First, AGL only leases dark fiber, requiring any customer to purchase and deploy all electronics to support the transmission of communications.[143] Second, the AGL network, for the most part, follows similar routes to a number of other facilities-based carriers. Third, AGL's network and pricing is primarily useful to serve extremely large data throughput needs, typically several GB to 10GB, rather than users needing much smaller T-1 or DS-3 capacity which make up a large segment of the business market.[144] Finally, in XO's experience, a carrier leasing from AGL is limited to using AGL laterals and cannot tie AGL facilities into their own network except at specified POPs, which further limits AGL as a viable wholesale alternative.[145] For the foregoing reasons, AGL's network is of very limited utility to CLECs serving business customers in the Phoenix MSA.

Qwest overstates by implication XO's presence as a wholesale alternative to competitive carriers. Qwest rattles off some general data regarding XO's networks nationally and, regarding the MSA at issue in the instant petition, simply notes that "XO's network map shows Phoenix as an XO market with a Metro IP Node, a Class 5 Voice Switch, and a Sonus Gateway."[146] While these basic facts regarding XO's presence in Phoenix are correct, XO today has limited ability to provide wholesale alternatives. As an initial matter, XO has its own facilities connected only to *****BEGIN HIGHLY CONFIDENTIAL *** ***END HIGHLY CONFIDENTIAL***** commercial buildings in the Phoenix MSA, only *****BEGIN**

142 *Id.*, at ¶¶ 4, 9.

143 *Id.*, at ¶ 6.

144 *Id.*, at ¶ 9. AGL's retail customers are typically large institutions with corresponding need for higher bandwidth services. *Id.*, at ¶ 5.

145 *Id.*, at ¶ 4.

146 *Second Phoenix Petition*, at 36.

HIGHLY CONFIDENTIAL *** *****END HIGHLY CONFIDENTIAL***** of all commercial buildings in the market. Adding additional buildings is a costly venture which XO undertakes only after developing a strong business case and a demonstrated capacity need of at least 3 DS-3s.[147] Indeed, only *****BEGIN HIGHLY CONFIDENTIAL ***** *****END HIGHLY CONFIDENTIAL***** new commercial buildings have been added by XO in the Phoenix MSA in the past sixteen months.

Further, leaving aside the business case which must be demonstrated before XO would build new laterals, XO's potential physical reach is quite limited in terms of additional commercial buildings within 500 and 1000 feet of XO's backbone network. As shown in XO's highly confidential *ex parte* filing of May 20, 2008 in the *Qwest 4* MSA proceeding, less than *****BEGIN HIGHLY CONFIDENTIAL ***** *****END HIGHLY CONFIDENTIAL***** of commercial buildings in the Phoenix MSA are within 500 feet of XO's backbone network and less than *****BEGIN HIGHLY CONFIDENTIAL ***** *****END HIGHLY CONFIDENTIAL***** of commercial buildings are within 1000 feet of its network.[148] Therefore, even if it were the case that XO could reach *all* of the buildings within 1000 feet of XO's backbone network within a commercially reasonable period of time, which would represent an almost *****BEGIN HIGHLY CONFIDENTIAL ***** *****END HIGHLY CONFIDENTIAL***** increase in the number of buildings it currently serves, XO would still only reach less than *****BEGIN HIGHLY CONFIDENTIAL ***** *****END HIGHLY CONFIDENTIAL***** of commercial

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147 *Govil Declaration, supra,* ¶ 19.

148 *See* Letter from Genevieve Morelli, Counsel for XO Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed May 20, 2008) ("*XO May 20th Ex Parte*"), at 2.

buildings within the Phoenix MSA.[149] Therefore, although XO does offer features, functions, and facilities on its network to other carriers as a wholesaler, its actual and potential reach is extremely limited and essentially insignificant in terms of supporting a grant forbearance from UNE obligations in response to the Qwest petition.[150]

Finally, the Commenters wish to make a few observations regarding Nextlink as a source of competitive alternatives. Nextlink is, as Qwest notes, an XO subsidiary offering wireless broadband services.[151] Although Nextlink announced two years ago its intentions to provide last-mile connectivity within the downtown Phoenix area, as Qwest notes, in reality Nextlink's progress has been measured. As of today, Nextlink has only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** hubs in the Phoenix MSA, one of which is subject to *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** Nextlink today serves business customers in only *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** buildings (not counting a connection to an XO local switching office, which is needed to support Nextlink's services to *****BEGIN HIGHLY CONFIDENTIAL***** *****END HIGHLY CONFIDENTIAL***** of the customer sites) within the Phoenix MSA. As such, Nextlink is not a significant source of competition for Qwest for last-mile connectivity on either a retail or a wholesale basis.

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149 As explained in the *May 20th Ex Parte,* whether or not XO could build laterals to these buildings depends greatly on each building's demand, as well as other factors such as building access and specific loop plant build characteristics. *Id.*, at 3.

150 The *XO May 20th Ex Parte* is currently being updated and the results will be filed when they are available.

151 *Second Phoenix Petition*, at 36-37.

In addition, as explained in the attached Declaration of Mr. Michael Lasky of Widelity, Inc., broadband wireless provided by Nextlink, using its Local Multipoint Distribution Service ("LMDS") licenses, has limited potential for providing a wholesale alternative material to any market power analysis despite Qwest's claims that wireless broadband from Nextlink can be offered ubiquitously in any wire center.[152] As an initial matter, LMDS is a line-of-sight technology with limited usefulness where physical features such as buildings, trees, or hills block the potential signal path.[153] Indeed, *****BEGIN HIGHLY CONFIDENTIAL*****

*****END HIGHLY CONFIDENTIAL***** sites served today by Nextlink in the Phoenix MSA require the use of repeater sites to overcome lack of line-of-sight, a factor which greatly increases the cost and potential delay in serving customers.

In addition, LMDS equipment is expensive to deploy to a building, both in terms of wireless hubs and customer locations, and can be time consuming.[154] Not only must rooftop rights obtained from the property owner, but the rights to wire the building to the intended customer must also be obtained and the work implemented,[155] all factors which can adversely affect the timely delivery of service to customers, retail or wholesale, when compared with wireline alternatives.[156] Volumes of service in this band is relatively low, preventing manufacturers from "ramping up" production in a manner that allows them to pass along volume

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152 *Id.*

153 Declaration of Michael Lasky, Principal, Widelity, Inc., Sept. 21, 2009, ("*Lasky Declaration*"), appended hereto as Appendix B, at ¶ 5.

154 *Id.*, at ¶ 6.

155 *Id.*, at ¶ 10. LMDS is a rooftop-to-rooftop deployment. In some instances, buildings are designed with tenant connectivity from the basement up to the tenant floor. Revising the deployment scheme to facilitate roof-down connectivity can often involve significant construction and customer disruption. *Id.*

156 Zoning requirements and landlords often limit the number and size of antennas that can be installed on a roof, making the total number of customers served from a hub a finite amount. *Id.*, at ¶ 9.

pricing.[157] When built into the customer pricing model, circuit costs reflect these higher deployment costs, making a price-competitive offering difficult to provide, especially for DS0 and DS1 circuits.[158] As a result, as detailed by Mr. Lasky in his Declaration, the 28 GHz links used to deliver LMDS services (both point-to-point and point-to-multipoint) are not a general substitute for copper loop circuits.[159]

E. Competition From Mobile Wireless Services

Qwest does not contend that, in the business market, competition from mobile wireless services supports its request for forbearance from UNE unbundling obligations. Qwest is correct in this omission since in the current marketplace, mobile wireless services are not a reliable, standardized substitute for wireline services in supporting business customers. Therefore, further discussion regarding mobile wireless competition in the enterprise market is not necessary.

F. Qwest's Line Loss Data Does Not Support Its Request For Forbearance From Section 251(c)(3) Unbundling Requirements

Data showing declines in Qwest's business lines provide no evidence of the actual facilities-based competition that is a prerequisite to Section 251(c)(3) forbearance. In support of its petition, Qwest cites decreases in its retail access lines, both business and residential, contending that these line losses show that various competitive alternatives are widely used in the MSA.[160] These figures show nothing regarding the state of the all-important *facilities-based* competition in these MSAs. As the Commission correctly noted on other occasions, line loss by an ILEC "does not necessarily indicate capture of that customer by a competitor, but may

157 *Id.*, at ¶ 6.

158 *Id.*, at ¶¶ 4, 11.

159 *Id.*, at ¶ 4.

160 *Second Phoenix Petition*, at 5-6.

indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access."[161] As the Commission added in the *Qwest 4-MSA Order,* "[t]here are many possible reasons for such decreases [in Qwest's retail lines served] unrelated to the existence of last-mile facilities-based competition."[162] Line losses may indicate that the consumers have abandoned their wireline voice service in favor of a non facilities-based offering or for a private network that does not involve the purchase of telecommunications services. Before Qwest can argue that line loss data should be included in the Commission's forbearance analysis, it must show that decreases in its line counts are not attributable to consumers moving from one Qwest product to another Qwest service offering but result from customers migrating to facilities-based last-mile competitors. Qwest has offered no such evidence here – only tired arguments rejected by the Commission in prior forbearance orders.

VI. A GRANT OF FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST

Beyond Qwest's failure to demonstrate that ongoing Section 251(c)(3) unbundling regulations are not necessary to ensure that its charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers, as discussed above, it is clear that the Qwest petition is not consistent with the public interest, and therefore does not satisfy the third prong of the Section 10(a) test. There are several reasons compelling the conclusion that the grant of forbearance to Qwest in the Phoenix MSA would run counter to the public interest. And it is not an exaggeration to suggest that granting forbearance would have

161 *Anchorage Forbearance Order*, at n. 88.

162 *Qwest 4-MSA Order*, at ¶ 30.

significant deleterious public interest impacts that would extend far beyond the MSA under consideration here.

A. Competition Would Be Diminished If Forbearance Is Granted

In the *Omaha Forbearance Order*, the Commission analyzed the third prong of the Section 10(a) test (*i.e.,* whether forbearance from the unbundling obligations of section 251(c)(3) would be in the public interest) largely on the basis of the actual competition which existed within the wire centers of the Omaha MSA. The Commission noted that the factors upon which it based its conclusions regarding satisfaction of the first two prongs of the Section 10(a) standard "also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under section10(a)(3)."[163] The principal factor guiding the Commission in the Omaha case, of course, was evidence of sufficient facilities-based competition in the particular wire centers in which forbearance was granted. Likewise, in the *Anchorage Forbearance Order*, the Commission based its grant of forbearance on the fact that "ACS is subject to a significant amount of competition in the Anchorage study area."[164]

As discussed above, Qwest has not demonstrated sufficient facilities-based retail or wholesale competition in the subject MSA. Accordingly, not only has Qwest failed to meet the first two prongs of the Section 10(a) standard, it has failed to satisfy the public interest standard under Section 10(a)(3).

163 *Omaha Forbearance Order*, at ¶ 75.

164 *Anchorage Forbearance Order*, at ¶ 49.

In the *Omaha Forbearance Order*, the Commission also found that the costs of continued Section 251(c)(3) unbundling outweighed the benefits;[165] something which Qwest claims is true in the Phoenix MSA.[166] The Commission concluded that the "costs [of unbundling] are unwarranted and do not serve the public interest once local exchange and access markets are sufficiently competitive, as is the case in certain limited areas of the Omaha MSA."[167] Here, because Qwest has failed to demonstrate sufficient competition in the Phoenix MSA, the Commission has no basis to conclude, even "in certain limited areas of the [subject] MSA," that the costs of unbundling outweigh the benefits.

More particularly, Qwest offers no evidence in its petition that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout the Phoenix MSA.[168] Indeed, the evidence is compelling that competitive conditions in these MSAs are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition.

Qwest relies in part on the competition provided by "traditional CLECs" to support its requested relief in the business market.[169] Yet these competitors in the Qwest

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165 *Omaha Forbearance Order*, at ¶¶ 76-77.

166 *See Second Qwest Petition*, at 43.

167 *Omaha Forbearance Order,* at ¶ 77.

168 Qwest claims that the unbundling requirements in the subject MSA are "excessive." *See, Second Qwest Petition*, at 43-44. Because Qwest has failed to meet its burden to demonstrate sufficient competition, it has no foundation for this assertion. As a result of this failure, any assertion that its unbundling obligations are "excessive" reduces to the untenable assertion that *any* of its unbundling obligations are excessive, a conclusion which is totally at odds "with Congress's clear intent in section 10 to sunset *in a narrowly tailored fashion* any regulatory requirements that are no longer necessary in the public interest so long as consumer interests and competition are protected." *See Omaha Forbearance Order*, at ¶ 40 (emphasis supplied).

169 *Second Qwest Petition*, at 28-31.

incumbent local operating territory – including the Commenters – continue to rely overwhelmingly on Qwest-provided unbundled loop and transport UNEs to serve their customers. If the current regulatory obligation on Qwest to make these wholesale inputs available to competitors on cost-based (*i.e.,* TELRIC) rates and terms were to disappear through forbearance, it is difficult to see how consumers and competition would benefit. Indeed, the result would quite likely be the opposite; wholesale rates for loops and transport would rise, driving some competitors out of the market entirely and forcing the remaining carriers to raise rates and limit service options.

Qwest also contends that "eliminating unbundling regulation will 'further the public interest by increasing regulatory parity' between telecommunications providers in the Phoenix MSA."[170] Qwest argues that because it is losing customers to intermodal wireless and broadband competitors, it would be in the public interest to end allegedly unequal regulation between the different technological modes of delivery.[171] In the *Omaha Forbearance Order*, however, the Commission made clear that the impetus to create technological parity is warranted only "[o]nce the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities."[172] As shown herein, there is not yet sufficient actual facilities-based competition from other service providers in the Phoenix MSA. Steps taken to establish technological parity cannot precede the emergence of sufficient competition but, instead, must effectively derive from it. Given the state of the market in the MSA at issue and Qwest's failure to meet its burden of proof, establishing

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170 *See Second Phoenix Petition*, at 44 (*quoting Omaha Forbearance Order*, ¶ 78).

171 *Id.* As noted above, Qwest does not cite any specific competition in the business market from commercial mobile service providers.

172 *Omaha Forbearance Order*, at ¶ 78.

technological parity at this time in the Phoenix MSA would be unwarranted, premature, and certainly *not* in the public interest.[173]

In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[174] A finding that forbearance will promote competition could form the basis for a conclusion that forbearance is in the public interest. At the same time, however, a mere finding that forbearance would not be detrimental to the public is not enough. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance. Qwest has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

B. Consumers Would Be Harmed If Forbearance Is Granted

Even if the Commission concludes that the needs of individual competitors do not present a compelling basis upon which to resolve Qwest's petition (and the Commenters do not suggest that this is the case), Section 10(a)(3) compels the Commission to give great weight to the interests of *telecommunications consumers* in the MSA at issue. Careful consideration of the current state of competition in the Phoenix MSA leads inexorably to the conclusion that consumers would suffer significant harm should forbearance be granted.

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173 Notably, Qwest fails to make the argument, relied upon by the Commission in the *Omaha Forbearance Order*, that forbearance would motivate Qwest to compete vigorously on both a retail and a wholesale basis. *See Omaha Forbearance Order*, ¶¶ 79-81.

174 47 U.S.C. § 160(b).

As discussed above, competitive carriers continue to rely on Qwest's loops and transport facilities to reach their customers. Continued access to Qwest's loops and transport under Section 251(c)(3) at TELRIC rates is critically important to carriers serving either the residential market or the business market in Phoenix. Unfortunately, widespread wholesale alternatives to use of Qwest's facilities and services do not presently exist, and complete self-supply generally is not practically or economically feasible. The ability to use Qwest's network at cost-based rates remains absolutely essential to ensure that consumers of competitive carriers continue to enjoy the value-added competitive services they currently enjoy today and to take advantage of the competitive innovations of tomorrow.

Because competitive carriers remain reliant on access to Qwest's loop and transport UNEs, the grant to Qwest of forbearance from UNE unbundling obligations (including TELRIC pricing) would force competitive carriers to raise prices, narrow their service offerings, and curtail the introduction of innovative broadband and other products and services. Thus, millions of consumers in the Phoenix MSA soon would be faced with less carrier and service choices and, perhaps most importantly, higher prices.

VII. CONCLUSION

For all of the foregoing reasons, Qwest's petition for forbearance from Section 251(c)(3) unbundling obligations in the Phoenix MSA should be denied.

Respectfully submitted,

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September 21, 2009

APPENDIX A

REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	
Forbearance Pursuant to	)	WC Docket No. 09-135
47 U.S.C. § 160(c) in the	)	
Phoenix Metropolitan Statistical Area	)	

HIGHLY CONFIDENTIAL DECLARATION OF BRYAN BURNS

1. My name is Bryan Burns. I am the Vice President of Network Planning at XO Communications, LLC ("XO"). I have been with XO since June 1996. Over the past thirteen years, I have held positions within XO in the departments of operations, finance, engineering and architecture. In my Network Planning role at XO Communications, I have responsibility for designing the XO network in the market of Phoenix, including outside plant, transport electronics, data networking and voice networking design.

2. I have been in the telecommunications industry for 18 years. Prior to joining XO I was employed at Sunshine Cellular, in the position of network engineer, and at LEGI-SLATE, in the position of software developer..

3. I have been asked to explain the use that XO makes in the Phoenix market of the wholesale offerings of AGL Networks ("AGL") and the limitations of those offerings in connection with XO's response to the forbearance petition filed by Qwest Corporation for relief from network unbundling obligations in the Phoenix Metropolitan Statistical Area ("MSA").

4. AGL designed its network in the Phoenix MSA to offer dark fiber to other telecommunications carriers. Principally, AGL is an outside plant construction company

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primarily selling dark fiber to large institutions and carriers and not distribution to buildings outside of those parameters to any considerable degree. Accordingly, AGL provides a minimum degree of access to end user locations, providing connections to fewer than eighty (80) buildings within the Phoenix MSA and requiring carrier customers to access its network at a limited number of POPs (points of presence). To my knowledge, AGL does not have plans to expand the number of buildings that it offers access to materially in the near term. Instead, AGL extends its fiber to new buildings to meet customer requests for a lateral.

5. AGL is not, to my knowledge, a provider of retail services, and none of the fiber it offers is lit. However, I do understand that AGL sells dark fiber to several very large institutions that have large capacity needs and can justify the investment in telecommunications infrastructure, as an alternative to buying retail services from telecommunications carriers.

6. Within a building that AGL's network reaches, a carrier customer must obtain from the building owner the right to place facilities equipment and wiring within the building to reach specific end user customer premises, and must assume the full costs of installing the wiring and other equipment within the building to serve the end user customer.

7. XO has plans to begin to make use of AGL dark fiber within the Phoenix MSA, but on a limited basis. XO will use AGL for *****BEGIN HIGHLY CONFIDENTIAL*****

*****END HIGHLY CONFIDENTIAL*****

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8. XO will connect its own network facilities to the AGL core fiber network at ***BEGIN HIGHLY CONFIDENTIAL***

END HIGHLY CONFIDENTIAL (I believe AGL has approximately 225 *route* miles within its network, including building laterals.) Under our arrangement, XO can ***BEGIN HIGHLY CONFIDENTIAL***

. ***END HIGHLY CONFIDENTIAL***

9. While XO can, under its agreement with AGL, ***BEGIN HIGHLY CONFIDENTIAL***

END HIGHLY CONFIDENTIAL, it would be a very expensive way to reach customers in these buildings. The economics of using AGL for last mile access to a customer that happens to be in the buildings the AGL network reaches is such that the customer must be one that demands extreme higher end bandwidth. Indeed, XO would consider using AGL only where an end user had the need for multiple 1 Gbps circuits or a 10 Gbps pipe and/or at price points that pay for the infrastructure. As I mentioned earlier, XO will use AGL to ***BEGIN HIGHLY CONFIDENTIAL*** ***END HIGHLY CONFIDENTIAL*** But for meeting the bandwidth needs of most of XO's existing and potential customers, AGL is not and will not be an economically feasible wholesale alternative to, say, Qwest unbundled loops or enhanced extended loops, or EELs.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on September 21, 2009

Bryan Burns

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	
Forbearance Pursuant to	)	WC Docket No. 09-135
47 U.S.C. § 160(c) in the	)	
Phoenix Metropolitan Statistical Area	)	

DECLARATION OF MICHAEL LASKY

1. My name is Michael Lasky. I am a Principal at Widelity, Inc. ("Widelity"). My business address is 4031 University Drive, Suite 200, Fairfax, Virginia 22030.

2. Widelity is a professional services company that provides a wide range of consulting services to the telecom industry. Radio Frequency ("RF") design and deployment is one of our primary practice areas. We have deep expertise in the design, planning and deployment of Local Multipoint Distribution System ("LMDS") links and services. Widelity has built and deployed more than 125 LMDS links and hubs for multiple customers.

3. I have been asked to respond to a portion of the Declaration of Robert H. Brigham that was attached to Qwest's petition for forbearance in the above-captioned proceeding. Specifically, I have been asked to comment on paragraph 45 of Mr. Brigham's Declaration in which he contends that an affiliate of XO Communications, LLC ("XO") -- Nextlink-- offers "a range of broadband wireless services" in Phoenix to both enterprise and wholesale customers, and that these offerings compete directly with Qwest to "provide 'last mile' connectivity to customers."

4. Although not expressly stated by Mr. Brigham, the implication is that Nextlink's LMDS services can be used widely as a Wireless Local Loop ("WLL") replacement for Qwest's copper loop facilities. Such a conclusion would be erroneous. Based upon my own recent and extensive experience with LMDS, I can state unequivocally that the 28 GHz links used to deliver LMDS services (both point-to-point and point-to-multipoint) are not a general substitute for copper loop circuits. Although such 28 GHz fixed wireless links are a viable method of connectivity in certain very specific instances, they can only be economically used for very high capacity links (at least 10 megabits) and can only be used to reach commercial buildings that meet a set of highly limiting engineering criteria. I explain the bases for my conclusion hereafter.

5. One of the foremost limitations of LMDS is that it is a line-of-sight technology. Broadcast microwave signals operating at 28 GHz are transmitted to receiver dishes that typically are installed on the top of commercial buildings. At that high frequency, line-of-sight is required for adequate signal performance. Many times both ends of a circuit are not and cannot be line-of-sight. There often are physical features blocking the necessary signal path. Intervening buildings, trees, or hills are typical obstacles. These impediments disqualify a large proportion of sites from LMDS use. Indeed, in many markets line-of-sight is the exception rather than the rule.

6. A second major impediment to wide-scale use of LMDS as a loop replacement vehicle is that LMDS equipment is very expensive to deploy. Volume in this band is relatively low which prevents manufacturers from "ramping up" production sufficiently to permit them to pass along volume pricing. When built into the customer pricing model, circuit costs reflect these higher deployment costs, making a price-competitive offering difficult to provide. As a

practical matter, this means that Nextlink can compete only for customers in need of DS-3, OC-3, and OC-12 services, even in those geographic locations which are conducive to deployment of LMDS links. LMDS cannot be used economically to replace Qwest's DS-0 or DS-1 loops.

7. LMDS also is hampered by limited range. A typical deployment that can satisfy carrier-grade Service Level Agreements ("SLAs"), which specify a mandatory level of availability, is in the range of 3 to 5 miles. This meets the needs of some customers, but significantly limits the ubiquity of the offering in many markets.

8. The fact that LMDS requires a hub and spoke architecture presents yet another problem. Hubs – usually located on commercial rooftops – are expensive and time consuming to acquire. Lead times are long and, when rooftop real estate must be acquired, the inherent delay is a major impediment to the timely delivery of service to customers. In addition, rooftop rental is quite expensive in urban markets, which adds significantly to the cost of the circuit for customers.

9. In addition, LMDS hubs can be placed only in very limited locations. Hubs must be carefully chosen and are limited in capacity. Only buildings identified as having significant fiber capacity to the premise can be considered for hub deployment options. Zoning requirements and landlords often limit the number and size of antennas that can be installed on a roof, which limits the total number of customers that can be served from the hub. Once a hub is filled, the process of acquiring and provisioning another hub must start anew. In some markets, the number of available and qualifying buildings is quite limited, which effectively caps the number of customers that can be served in those markets.

10. Since LMDS requires rooftop-to-rooftop deployment, it is useful only where service providers can obtain connectivity between the building rooftop and a specific customer

premise within the building. Buildings are sometimes designed with tenant connectivity from the basement up to the tenant floor. Revising the deployment scheme to facilitate roof down connectivity often can require costly construction and significant customer disruption.

11. To summarize, LMDS-based WLL services can be an attractive alternative last-mile connectivity option in certain very limited circumstances. However, due to technical problems and high cost, use is necessarily limited and spotty. LMDS can only be used to serve customers that can be reached on a line-of-sight basis, that are located in a building where rooftop antenna rights can be obtained, and that have connectivity available from the customer premise floor to a rooftop. Even then, the current economics of LMDS dictate that it can be used economically only for very high capacity services, and never as a replacement for the copper-based DS-0 and DS-1 local loop facilities of Qwest.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on September 21, 2009

Michael Lasky